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No. 392.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE E. SHIMER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA.

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

The above named applicants; trade associations representing the mutual savings banks of the United States, the home builders of the United States, and the mortgage bankers of the United States, hereby respectfully move this Court pursuant to U. S. Sup. Ct. Rule 42, Par. 2, 28 U. S. C. A., for leave to file the attached brief as *amici curiae* in support of the petitioner. Consent to the filing of the attached brief has been refused by counsel for respondent.

Mutual savings banks are the largest investors in the United States in home loans guaranteed by the Veterans' Administration. As of September 30, 1960, mutual savings

banks held 9.1 billion dollars in V. A. guaranteed loans out of a total national program of 29.8 billion dollars. These loans have been made in reliance on the long established practice of the Veterans' Administration of fulfilling its guaranty without requiring the lending bank to bring action under state laws to establish the amount of the borrower's deficiency. If the decision below is allowed to stand, many of the loans now held will become subject to a potential jeopardy not contemplated when the loans were made. In the event of substantial economic decline and the consequent increase in defaults, the lender could be forced by the decision below to bear an unanticipated share of any deficiency and the not inconsiderable legal costs of bringing innumerable actions under state deficiency laws. Petitioner has pointed out in its petition for certiorari that deficiency judgment legislation exists in many states, including Georgia, Maryland, New York, Idaho, Ohio, South Carolina, Michigan, North Dakota, Mississippi, Oklahoma, Louisiana, Wisconsin and Vermont. In these states, mutual savings banks hold over $2 billion in V. A. guaranteed mortgages. In the State of Pennsylvania, the situs of the realty involved in this case, the mutual savings banks hold $455,731,000 in V. A. guaranteed mortgages.

The above named applicant, the National Association of Mutual Savings Banks, by virtue of the considerable commitment of its members in V. A. mortage loans, respectfully submits that it has interest in the disposition of this case. Further, the trustees of mutual savings banks owe the strictest fiduciary duty to their banks in managing assets and since a decision to affirm could put in question the realizable value of these assets upon default, it may well be a responsibility of these trustees to seek to intervene in this case through the medium of their trade association.

The home builders of the United States represented by the National Association of Home Builders, are interested in the disposition of this case because of the great number of sales of homes which they are able to make by virtue of the willingness of institutional lenders to lend money to veteran-purchasers under the V. A. guaranty loan program without requiring a down payment. This source of purchaser funds may be greatly reduced if the decision below is affirmed and thus the prospective construction and sale by home builders and purchases by veterans throughout the country will be seriously prejudiced.

The Mortgage Bankers Association of America is interested in the disposition of this case because it has among its members all types of institutional investors, including life insurance companies and savings banks. The Association also represents mortgage companies throughout the United States which originate V. A. mortgages in large volume and service them for the institutional investors they represent. If the decision below is affirmed, considerable unanticipated financial burden will be imposed upon mortgage companies which are charged, under their servicing contracts with the responsibility for protecting the interests of their investors for a fixed amount that cannot be changed. Also if the decision below is allowed to stand, the opportunities for sales of V. A. mortgages by mortgage companies will be greatly reduced.

The attached brief will set forth arguments on the probable effect of this case on the V. A. lending program that will be relevant in determining whether the decision below tends to frustrate the legislative intent of the Servicemen's Readjustment Act of 1944, 38 U. S. C. A. 1801 et. seq. These arguments may not be available to, or may not be adequately urged by, petitioner.

The applicants are greatly interested in obtaining a holding by this Court as to the applicability of state deficiency judgment laws to the Servicemen's Readjustment Act of 1944 so that savings banks and mortgage bankers may reappraise the extent of their prudent participation in the V. A. guaranty program and home builders may adjust their building programs in recognition of the probable financing funds that will henceforth be available.

The applicants pray that the Court grant this motion and permit the filing of the attached brief.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Statement.

As the parties are described and the facts stated in the briefs of petitioner and respondent, it is deemed unnecessary to repeat them here.

ARGUMENT.

The decision of the court below is incompatible with the purpose and provisions of the Servicemen's Readjustment Act of 1944 and therefore should be reversed.

I.

The purpose of facilitating the financing of homes for veterans has been frustrated by the decision of the court below because the effect of that decision will be to deter institutional lenders from investing in V. A. guaranteed loans. These loans, generally bearing lower interest rates than conventional loans, have been attractive to lenders in the past because of the security afforded by the guaranty device and because lenders could seek investment throughout the country under a standard form of agreement and be confident that the guaranty device would accord predictable substantive rights in all jurisdictions. Section 506 of the Servicemen's Readjustment Act of 1944 (38 U. S. C. A. 694g, now 38 U. S. C. A. 1816) provides that payment on the guaranty be made in the event of "default". Lending institutions have loaned millions of dollars in reliance on this practice and on what they have confidently believed the Act to provide. They are now to understand that although the guaranty still theoretically exists, the amount of the guaranty is contingent upon the future determination by state courts of the "fair market value" of the property securing the loan.

The decision of the court below thus destroys that certainty of guaranty which the Act led lenders to accept in lieu of the standard requirement of a substantial down payment. If the real value of the guaranty is to remain unpredictable until deficiency judgment proceedings under

various and varying state laws have been pursued, lenders cannot regard the guaranty as an acceptable substitute for a down payment. If lenders are forced to re-establish the down payment requirement in the case of veterans seeking homes, many veterans will be effectively denied the very opportunities which the Congress sought to extend to them in the Act. In any event, a searching reappraisal by lenders of the future value of investment in V. A. guaranteed mortgage loans, particularly in the case of requests for 100% loans, will be necessary if the decision of the court below is allowed to stand.

An example of the fact that the actual amount of the guaranty is crucial to the lending decision can be seen by reference to the law of one of the larger savings bank states. The N. Y. Banking law, Sec. 235 (20) authorizes savings banks to invest in "any bond and mortgage guaranteed pursuant to the provisions of the act of Congress entitled the 'Servicemen's Readjustment Act of 1944', or (3) provided the mortgage is a first lien, any bond and mortgage at least twenty per centumn of which is guaranteed pursuant to the provisions of such act;". The savings banks of the State of New York held 6.3 billion dollars in V. A. mortgages as of the end of 1959. Unlike conventional loans, which are restricted to New York or an adjoining state (N. Y. Banking Law, Sec. 235 (6)) savings banks may make V. A. guaranteed loans anywhere in the United States (Section 235(20)). Further, in reliance on the guaranty feature, the New York legislature has also exempted V. A. loans (Sec. 235(20)) from statutory provisions limiting the total percent of mortgages which may be held by a savings bank and from maximum loan to appraised value limitations on individual mortgages. It seems clear that the New York legislature, in allowing nationwide investment, and other exemptions to V. A. mortgages, was relying on an

actual, not a hypothetical, guaranty of 20% of each first mortgage loan, applied uniformly no matter what state was the situs of the realty.

Since the decision of the court below makes the actual dollar guaranty of V. A. mortgage loans dependent on the future contingency of what fair market value may be set on the property pursuant to state court proceedings, the 20% formula on first lien mortgages can no longer be said to obtain with certitude, and it must therefore be expected that affirmance of the decision below will have the possible result of rendering billions of dollars of V. A. mortgage loans illegal investments under the laws of New York.

Lenders throughout the United States will find a further deterrent to future participation in the V. A. program, *i.e.*, the uncertainty created by the decision of the court below as to the applicability of state law. The court states, *United States* v. *Shimer* (276 F 2d 792, at 796-7):

> "Of course, in those states where no deficiency judgments are permitted and thus the mortgagee is completely deprived of his right to collect the full amount of the indebtedness, the Act would be ineffectual. In such cases the state law must be presumed to be inapplicable."

Thus, the reasoning of the decision below leads to the inference that state laws are the criterion of the amount of the Veterans' Administration guaranty, but only those state laws that do not frustrate the Act so as to render it ineffectual. Apparently, then, by application of this line of reasoning, there may be state laws which are compatible with the Act and which must be used in interpreting the Act, while other state laws would render the Act ineffectual and would be regarded as inapplicable. The reasoning of the court below on this point demands of the lender an impracti-

cal nicety of judgment in appraising the probable application of state laws to the guaranty loan program, and thus the actual amount of the effective guaranty. Since ability to change state laws rests primarily with the state, a kaleidoscopic series of patterns concerning the effective guaranty under the federal Act could be created by state action in adopting various amendments to pertinent state laws, frequently without consideration of the resultant effect such action would have upon the federal Act. Unless the Congress is to be regarded as contemplating this multi-state chaos to the obvious detriment of the historic and efficient functioning of the federal Act, then the decision of the court below must be rejected.

II.

The court below has stated that although Section 506 of the Servicemen's Readjustment Act of 1944 (38 U. S. C. A. 694 g, now 38 U. S. C. A. 1816) "authorizes payment of the guaranty by V. A. in the case of each and every default, it does not purport to spell out the amount which is to be paid; it merely refers to the guaranty." (276 F 2d, 794). The court went on to conclude that since no detailed formula is found in the federal statute, computation of the amount of the guaranty is a matter to be decided by reference to state law.

It is submitted that many of the reasons found in support of this conclusion were erroneous and that more compelling reasons pointing toward a contrary result were omitted.

Absence of a guaranty formula in the statute need not and perhaps should not suggest the conclusion that the legislative intent was to leave the problem to state determination. It is at least as likely that a guaranty formula

was omitted from the statute in order that the question might be dealt with flexibly by federal regulation rather than for the purpose of allowing basic substantive rights under a national program to be decided pursuant to as many formulas as there are states. Further, an example of recourse to regulation rather than state law in determining the amount of guaranty is found in 38 U. S. C. A. 1821: "Incontestability". That section empowers the Administrator to issue regulations establishing partial defenses to the amount payable on the guaranty. This is hardly consistent with the view of the court below that the entire pattern of the Act contemplates reference to state law in order to determine the amount of the guaranty.

Conclusion.

Wherefore, these *amici curiae* respectfully urge that the decision of the court below be reversed.

Respectfully submitted,

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SAMUEL E. NEEL,
HERBERT S. COLTON,
PATRICK JAMES RIORDAN,
Of Counsel.

Affidavit of Service.

I, PATRICK JAMES RIORDAN, counsel to the National Association of Mutual Savings Banks, and an attorney admitted to practice in the courts of the State of New York, but not a member of the bar of this court, do hereby depose and say that on the 16 day of February, 1961, pursuant to Rule 33 (3)(c), 28 U. S. C. A., I served a copy of the foregoing motion and brief on the following attorneys by mailing a copy to each of them in duly addressed, special delivery, postage prepaid envelopes to their respective addresses noted below, said attorneys representing all the parties to the captioned proceedings:

Hon. ARCHIBALD COX, Esq.
Solicitor General
Washington 25, D. C.

EDWARD DAVIS, Esq.,
215 South Broad Street
Philadelphia 7, Pa.

(SIGNED) Patrick James Riordan

Subscribed and sworn to before me, at New York
New York this 16 day of February, 1961.

Dorothea D. Chase

DOROTHEA D. CHASE
Notary Public, State of New York
No. 60-8567[illegible]
Qualified in Westchester County
Certificate filed in N. Y. County Clk.
Commission Expires [illegible]